

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM J. PANTER)	
)	
v.)	DOCKET NUMBER
)	BN07528310051
DEPARTMENT OF THE AIR FORCE))	DATE: <u>20 JUL 1984</u>
)	

OPINION AND ORDER

Appellant was removed from his position as Warehouse Worker Foreman at the Pease Air Force Base Commissary for theft of Commissary goods and improper handling and disposal of salvageable merchandise. On appeal to the Board's Boston Regional Office, the presiding official sustained both charges and, after considering the penalty in accordance with Douglas v. Veterans Administration, 5 MSPB 313 (1981), affirmed the removal action.

Appellant has now filed a petition for review of that decision in which he asserts that: (1) the presiding official erred in failing to issue the initial decision within 25 days of the close of the record; (2) the presiding official erred by admitting into evidence testimony which was irrelevant to the charges; and (3) both the presiding official and the agency's deciding official erred in giving insufficient consideration to the factors set forth in Douglas, supra, which would lead to a lesser penalty.

Pursuant to 5 C.F.R. § 1201.111, a presiding official is to issue an initial decision within 25 days of the closing of the record. Thus, the failure to do so in this case was error. However, adjudicatory error which is not prejudicial to a party's substantive rights provides no basis for reversal of the initial decision. Karapinka v. Department of Energy, 6 MSPB 114 (1981). Beyond appellant's simple assertions that the delayed issuance of the initial decision resulted in emotional turmoil and violated his fundamental right to due process, he has pointed to no prejudice created by the error. This contention, therefore, will be given no further consideration.

The Board finds no error with regard to appellant's second contention. Appellant has not specified the testimony to which he refers and review of the initial decision reveals no improper reliance on irrelevant matters. Insofar as the presiding official may have considered the fact that the Commissary was vulnerable to, and had been the target of, thefts, we find such consideration proper, as discussed below, to a determination of the appropriateness of the penalty.

With respect to that issue, which is appellant's third contention, after careful consideration of the facts and circumstances of the case, the Board finds no error by the presiding official in affirming the penalty of removal under Douglas, supra. Moreover, we have reconsidered the penalty in light of Miguel v. Department of the Army, 727 F.2d 1081 (Fed. Cir. 1984), in which the court held that removal of a Commissary worker was too harsh in relation to her theft of an item valued at only \$2, her many years of service, the numerous commendations she received, and other factors. Appellant in the instant case also has a long record of prior, apparently satisfactory, service.

Additionally, as the presiding official noted, he was experiencing emotional problems at the time of the theft. Balanced against those factors, however, are that Commissary workers received warnings against theft; appellant had signed such a warning only five days earlier; theft by commissary workers, who come into contact daily with millions of dollars worth of small items, is a particularly serious problem; such thefts obviously impact heavily on the employer-employee relationship because of the breach of trust they evidence; the instant theft was not only for personal gain but unlike in Miguel, supra, also apparently was deliberate, premeditated, and furtive; and, again unlike in Miguel, appellant was a foreman, in charge of Commissary salvage. Finally, of course, two charges are at issue in the instant case, the theft of almost \$10 of consumer products as well as the trashing, without recordation, of useable items as unsaleable in order to prepare for an inspection.

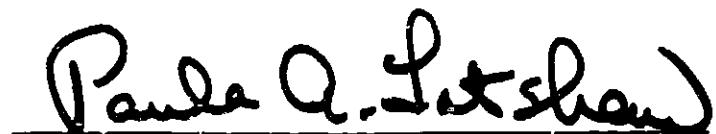
Considering all of these factors, the Board concludes that the penalty assessed by the agency is within the bounds of reasonableness and must, therefore, be affirmed. Accordingly, the petition for review is hereby DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Washington, D.C.



PAULA A. LATSHAW
ACTING SECRETARY